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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-922

CHRYSLER CORPORATION, *Petitioner*

v.

HAROLD BROWN, ET AL, *Respondent*

BRIEF AMICUS CURIAE OF THE ASSOCIATION FOR THE ADVANCEMENT OF INVENTION AND INNOVATION

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CONTENTS

	Page
THE AMICUS	1
INTEREST OF AMICUS	2
THE DECISION BELOW CONTRIBUTES TO AN UNFAVORABLE CLIMATE FOR INVENTION AND INNOVATION IN THE UNITED STATES	2
1. Public Policy Supports Providing Incentives for Invention and Innovation	2
2. The "Missing Link" to an Invention or Innovation May Reside in Submitted Confidential Information	4
3. Need for De Novo Review of Agency Action	8
(a) No Compensation provided for in act.	9
4. Small Business—Larger Business	10
5. Anti-trust Laws	11
SUMMARY	12
CONCLUSION	12

TABLE OF AUTHORITIES

	Page
CASES:	
EPA v. *Mink*, 410 U.S. 73, 80 (1973).	9
Kewanee Oil Co. v. *Bicron Corp.*, 416 U.S. 470 (1974)	6
Sears v. *Gottschalk*, 434 U.S. 965 (1977) denying cert.	6
Westinghouse Electric Corp. v. *Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied sub mon. Brown* v. *Westinghouse Electric Corp.* _____ U.S. _____ (1977).	5
TEXT:	
Federalist Paper No. 43 by James Madison	3

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I

THE AMICUS

The Association for the Advancement of Invention and Innovation ("A^2I^2") is a nonprofit professional association of inventors, entrepreneurs, research directors, businessmen, scientists, engineers, lawyers, patent attorneys, educators, former government officials and others who are dedicated to the proposition of improving the climate for invention and innovation in our country. The combined background of the membership embraces the entire spectrum of the process of invention (conceiving the

idea) and innovation (bringing the invention to the marketplace.)

II

INTEREST OF AMICUS

The Association seeks to foster a continually improving appropriate climate for invention and innovation in our country. A time-recognized basic or essential condition for invention and innovation is incentive to invest the time, money and effort to make inventions and innovations. In the view of A^2I^2 the present case raises issues which have a major impact on the process of invention and innovation in this country.

III

THE DECISION BELOW CONTRIBUTES TO AN UNFAVORABLE CLIMATE FOR INVENTION AND INNOVATION IN THE UNITED STATES

1. Public Policy Supports Providing Incentives For Invention and Innovation

We appear in this case because of our primary concern that invention and innovation are basically important to our country's continued health, economic welfare and military preparedness and that the decision below, if sustained, will derogate from a climate which fosters invention and innovation and our country's technological advancement.

The same knowledge and components basic to a vigorous, progressive society, economically speaking, are at the core of our defense.

The continued welfare of our people, jobs, health and pursuit of happiness have been and are dependent upon invention and innovation. This was and still stands recognized in the constitutional mandate of Article I, Section 8, Clause 8 wherein, in empowering the Congress to "promote" the progress of the useful arts, the founding fathers recognized the need to provide for exclusivity and protection of progress-promoting creative efforts. The Congress in exercise of its power in Article I, Section 8, Clause 8 enacted our patent laws. Only in one other place in the document does the word "promote" appear, to wit in its Preamble, wherein it is impliedly distinguished from the word "provide". It was the intent of the founding fathers to induce advances by promoting efforts to invent and to innovate.[1]

In implementing this constitutional mandate, Congress has consistently adhered to the principle that it must provide for, and protect, the exclusivity of intellectual property. This is to foster a suitable climate in which persons will have the incentive to invest their time, funds and effort to promote the progress of "the useful arts." The Nation's Patent System, its copyright and trade secrets laws are founded upon this principle.

In enacting the Freedom of Information Act, 5 U.S.C. §552, Congress had in mind continued adherence to this well tested means of stimulating expansion of our scientific, technical and commercial know-how. "Exemption 4" of the FOIA, 5 U.S.C. §552(b) (4) was enacted to ensure that trade secrets and commercial information which are confidential in

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[1] Federalist Paper No. 43 by James Madison.

nature and which, for one reason or another, are furnished by a private person or organization to the Government would not be subject to disclosure under the general mandate of the Act.

Today, however, all kinds of information are being sought and obtained from the Government under the FOIA including data which have been acquired by the Government which concern trade secrets, proprietary information and inventions. While some courts have correctly applied the fourth exemption to protect such data from improper disclosure, others, such as the court below, have interpreted the Act in such a way as to pose a substantial threat to the exclusivity of progress-promoting trade secrets, inventions and their innovation.

A²I² believes that invention and innovation are tremendously important to our country's continued health, economic welfare and military preparedness. In our view, the decision of the court below would result in inadequate promotion and protection of invention and innovation, and would retard rather than "promote the progress of the useful arts". This would be inconsistent not only with the legislative intent underlying the FOIA but, even more fundamentally, with the intent of Article I, Section 8, Clause 8 of the Constitution as expressed in Federalist Paper No. 43.

2. The "Missing Link" To An Invention May Reside In Submitted Confidential Information

There are many stages involved in the conception, refinement and ultimate commercial application of an invention, including research, development and manufacture. Each of these stages requires and in turn

generates a broad spectrum of data relating not only to technical matters but also to such areas as the hiring and assignment of personnel, their qualifications and fields of expertise, the objectives of the program, the design and building of equipment to be utilized, the materials to be employed, the processes to be applied, etc. A substantial portion of the invention and innovation in this Nation occurs in a competitive climate in which one person or company will be seeking to develop the same, or better, process, idea or equipment as another, at the same or an earlier time.

Often, the key to a successful commercialization effort may lie in what superficially appears to be an insignificant or obscure piece of information. Such bits and fragments of information often have proved to be the "missing link" between conception and successful development or marketing of an idea. Businesses (and individuals) as a matter of ordinary practice seek to obtain and analyze all of the information which they can acquire concerning related plans and activities of their competitors.[2] This kind of information can very materially aid a competitor to piece together the existence, nature, and objectives of a project which may heavily involve inventions and innovations

In the past, such information gathering activities were limited by virtue of the absence of sources of information, or were conducted surreptitiously through various types of "industrial espionage." At present, however, such surveillance often takes the

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[2] See Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), cert. denied sub nom. Brown v. Westinghouse Electric Corp., _____ U.S. _____ (1977).

form of requests for disclosure of confidential data under the Freedom of Information Act. Regardless of the method, any time that A is able to learn the nature of B's trade secret or confidential information, without either compensating or obtaining consent from B, the result is bound to be inherently harmful to B, anticompetitive, and contrary to the public interest.

This Court has recognized the public interest in preserving the exclusivity and confidentiality of the kinds of information utilized in invention (research) and innovation (development).[3] Yet, notwithstanding the Court's decision in *Kawanee*, decisions such as that of the court below threaten to allow the public disclosure of information which is equally deserving of protection as the type of information which the Court held secure in *Kewanee*. The result of such release could be just as damaging to the interest of a company, and therefore to the long-term public interest, as the infringement of rights which the Court condemned in that case.

Disclosure of confidential commercial information, and the adverse effects which release will often cause, is certain to constitute a disincentive to future efforts to invent and to innovate and to competition in so doing. For, as we observed previously, the proper climate must exist if people and businesses are to be willing to invest their time, resources and effort in the creative process of invention and innovation; and an essential ingredient of that climate is protection

[3] See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1970); Sears v. Gottschalk, _____ U.S. _____, 186 USPQ 161, denying cert. 183 USPQ 13. A²I² appeared as *amicus curiae* in these cases.

from what in effect would constitute arbitrary confiscation of intellectual property under the FOIA. The decision of the court below allows the disclosure of such information against the will of its creator, without any compensation, and without due procedural safeguards. It is therefore contrary to the mandate of Article I, Section 8, Clause 8 that Congress *promote* the useful arts, to make such release.

In the present case our interest is to persuade the Court to preserve the confidentiality of business information which can provide the missing link[4] in the effort of a person or organization to discover his competitor's plans, including his inventions and innovation operations.[5]

We have studied the FOIA, its legislative history and the cases which have been decided concerned with Exemption 4. In our view the FOIA was enacted to provide the citizen with information about his government. It was not enacted to provide avenues along which to take intellectual property and thus to circumvent the trade-secret and patent laws.

It is our view that the nature of confidential information required of or voluntarily submitted by a person or organization to the Government, which ordinarily would be kept secret by that person or organization, defines it as being the kind of information which the Congress did not intend to make subject to disclosure when it enacted the FOIA and the Act's fourth exemption.

[4] Westinghouse Electric Corp. v. Schlesinger, Supra.

[5] Our interest is a collateral one as to whether the specific nature of the information sought in the present case is the kind of information which should be released under FOIA or should be included within its confidentiality exemption.

Furthermore, whether information is released by the Government to others should depend *solely* upon whether it is business information (which may be the earlier-mentioned "missing link") and whether the submitter has treated it as confidential in the sense that it is part and parcel of his competitive stock-in-trade which ordinarily he would not release to just anyone. For, as we perceive it, the congressional intent underlying Exemption 4 is that the importance of maintaining confidentiality for business information which has been submitted to the Government outweighs that of disclosure of that information under FOIA, *especially in the absence of a provision in the Act for compensation for such disclosure.*

3. Need For De Novo Review Of Agency Action

As noted above, information which is superficially harmless may be, in fact, potentially greatly significant as a "missing link"—this underscores the undesirability of having the agency determine what is and what is not to be accorded confidentiality. Government agency personnel, because of their lack of expertise and business knowledge concerning the information to be disclosed, how it could be used, or what it might reveal, are not equipped to judge whether confidentiality of the information should be preserved. Moreover, the agency cannot really overcome reasonably the FOIA time limit imposed upon it. Consequently, agency decision-making must be subject to *de novo* court review if the property and related rights of submitters are to be adequately safeguarded.

In this context, delegation to the agencies of the discretion to disclose confidential information will frustrate the congressional intent underlying Exemption 4—which is, that the public interest in disclosure of information concerning the activities of its Government, however strong, does not warrant or require the disclosure of private business information which has been supplied to the government by private persons or organizations.

The inclusion of Exemption 4 in the FOIA reflects the balance of formula[6] intended by Congress, and this intent should be followed. The review, if any, of whether information sought to be released is confidential (and for this reason falls within the fourth exemption of the Act) should be limited to determining whether the submitter has in good faith termed or labeled it confidential or to be within the words of the FOIA exemption. Congress recognized that such intellectual property needed protection.

3.(a) No compensation provided for in act

No provision or procedure for compensation for taking such property was provided because Congress did not intend it to be taken. If the agency is to be given the power to release the information despite the contrary wish of the submitter, the issue should be determined ultimately by a court *de novo* following a required sufficient notice to the submitter of the intended release.

Each of these factors underscores the compelling need for *de novo* review of agency decisions to disclose confidential commercial information. Because of agencies' general lack of pertinent business expertise, because of the time constraints imposed upon agencies which prevent development of an

[6] EPA v. Mink, 410 U.S. 73, 80 (1973).

adequate agency record, and because of the due process implications of a decision to disclose confidential intellectual property, only a *de novo* hearing in the district court can adequately safeguard the important interests of the owners of such property, and of the Nation, in having Exemption 4 construed consistently with the original intent of Congress.

4. Small Business – Larger Business

The manner in which the Court decides this case will be particularly crucial to small businesses. The ability of such businesses to survive, compete and grow is often dependent upon the extent to which they innovate. Should those businesses be forced to operate as an open book, it would often become substantially more difficult for them to survive, let alone grow, in a market inhabited by other companies having far greater resources.

Small business needs protection for all kinds of information, which may in any manner be related as a missing fragment to its investments of time, funds and efforts to invent and to innovate. Presently, small business is creating a very substantial portion of invention and innovation.

All businesses start small. There are now hundreds of thousands of small businesses. Exclusivity or confidentiality of their information is critical to their well-being and continued existence and growth. After all, America's business is business.

An essentially agricultural community of small states became the great industrial and military power

we are—based very largely on the exclusivity and intellectual property protection accorded by the Congress and the States under our patent and trade secret laws which are time-honored and time-tested.

Also, larger firms which also heavily invest in R and D ventures would be prejudiced by disclosure of their confidential information.

5. Anti-Trust Laws

The disclosure or exchange of confidential information by one person or organization to another by way of FOIA request, however, unintentionally effected, can result indirectly in that which is now prohibited under our antitrust laws. Also, market concentration could be increased without any overt cooperation.[7] Further, this could affect seriously a small business seeking to survive among other businesses.

Finally, no business, large or small, can really afford to wage reverse FOIA suits, the cost of which the consumer must pay in the end.

The Court's decision should take into account the importance to our people of the factors discussed above.

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[7] The real party in interest need not be identified in an FOIA request.

SUMMARY

In summary, then, we urge the Court to decide that

1. The FOIA means what it states respecting confidential or secret information submitted as such.

2. The FOIA was enacted simply to protect people's right to know what their government is doing, and to obtain information about its activities, policies and procedures.

3. The submitter should be the person to decide in the first instance whether his information is to be released; his decision may, of course, be subject to judicial review.

4. Due process requires notification to the submitter of intended release and that responsive to that notification he should have a full, *de novo* opportunity to prevent the requested release.

5. Confidentiality of information related in any manner to the incentive to invest time, funds and effort in invention and innovation shall be preserved, this being in the long-term, enlightened self-interest of the public in the continued creation and growth of businesses.

CONCLUSION

The Freedom of Information Act was enacted to enable the public to learn more about how its Government was operating. The Act was not intended to countenance the disclosure of the details of a particular company's operations.

The decision of the court below departs from the congressional intent by (1) allowing disclosure of information deemed confidential by the submitter without his consent, and (2) curtailing the right of the owners of such information to obtain full and meaningful judicial review.

In both respects, the court of appeals' decision will discourage invention and innovation and will, therefore, deprive the public of the fruits of such efforts.

For these reasons, A^2I^2 urges the Court to reverse the decision of the court of appeals.

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